IN THE

Supreme Court of the United States

—o—

No. .....

—o—

A. J. MATTHEWS, as Trustee,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

—o—

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE UNITED STATES TO THE CIRCUIT COURT OF APPEALS

—o—

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, A. J. Matthews, as Trustee, respectfully represents that:

122639

The petition in the case at bar to condemn the easement for flowage rights over petitioner's lands lying in the Birds Point-New Madrid Floodway was filed under authority of the Secretary of War (Rec. 3).

The Birds Point-New Madrid Floodway, in which said lands lie was created under authority of Congressional Act passed May 15, 1928, a part of which Act was the Jadwin Plan, contained in House Document No. 90, 70th Congress, First Session. This Act is found in 33 U. S. C. A. Secs. 702a to 702n. (Rec. 3-4.)

Prior to the filing of this condemnation suit, and on January 14, 1932, respondent, United States of America, made written offers to petitioner to purchase the easement for flowage rights over the lands involved in this cause, and on February 26, 1932, and within the time agreed upon, petitioner, in writing, in form provided by the United States of America, accepted the offers made to purchase the said easement. (Rec. 193-223).

On April 22, 1932, the United States of America, by letter, attempted to withdraw the offers which had been made, and submitted an offer in a nominal amount. (Rec. 223-224).

On June 4, 1932, petitioner, by letter, refused to accede to the withdrawal of the prior offer which had been made and accepted, and refused to accept the nominal offer made. (Rec. 189-190).

On June 25, 1932, petitioner filed suit in the Court of Claims, seeking to collect from the United States of America the amount of the offer which was accepted. The Government filed demurrer and on April 10, 1933, a voluntary non-suit was taken and on the same date petitioner filed suit in the Court of Claims under the Tucker Act, seeking to recover the value of the easement which had been taken. (Rec. 46). Following this, and on August 17, 1933, condemnation suit in the case at bar was filed in the United States District Court for the Eastern District of Missouri, seeking to condemn the easement for flowage rights over petitioner's lands lying in the Birds Point-New Madrid Floodway.

On October 9, 1933, (Rec. 1) petitioner filed pleading in this cause. (Rec. 21) as a result of which the Court entered an order holding in abeyance the condemnation action until the determination of the suit which had been filed in the Court of Claims April 10, 1933; and from court to court, upon motion of the United States of America, the order holding condemnation suit in abeyance and the appointment of commissioners was kept in effect. (Rec. 75).

On May 31, 1938, the Court of Claims adjudged that there had been no taking of the easement within the meaning of the Fifth Amendment to the Constitution and dismissed the action in that Court for want of jurisdiction. (Rec. 112).

At the April term, 1939, of the said District Court of the United States for the Eastern District of Missouri, petitioner, in the case at bar, filed motion for the appointment of commissioners to assess the value of the easement and the United States of America filed motion to dismiss the condemnation suits, with the right to re-file, —no grounds for dismissal being alleged in the motion. (Rec. 84).

On the 5th day of October, 1939, motion to dismiss the petition to condemn in the case at bar was granted by the District Court (Rec. 87).

After the appeal in the case at bar was perfected to the United States Circuit Court of Appeals for the Eighth Circuit, and after the decision in Danforth v. United States of America, 308 U. S., 271, holding similar contract to purchase easement for flowage rights was binding on the Government in a suit to condemn, and on the 10th day of April, 1940, petitioner herein filed motion in the Circuit Court of Appeals seeking an order permitting him to amend his answer and set up the said con-

tract in the form of a written offer to purchase the easement for flowage rights made by the Government and his written acceptance of that offer (Rec. 183).

All plans for the work of said floodway were approved January 14, 1929, and the work is complete except for the cutting down of the fuseplug section. The flowage rights over all the lands of the floodway, except the lands involved in the present litigation, have been secured by the Government either by purchase or condemnation. The total acreage is approximately 131,000 acres and the total acreage of petitioner's lands is approximately 20,000 acres (Rec. 112-113).

The Floodway Act passed in 1928 not only authorized the condemnation of the easement for flowage rights, but directed and commanded that the easement for flowage rights over the lands in said floodway be condemned. The Jadwin Plan was approved by the President and said Act was passed based upon his recommendation and following its passage, and on December 11, 1928, the President issued an executive order directing that the easement for flowage rights upon all the lands lying in the floodway be either purchased or condemned. It was in conformity to this executive order of the President that the written offer to purchase the easement was made by the Government. (Rec. 186).

The District Court, without written opinion, allowed the motion of plaintiff, United States of America, in this action, to dismiss the suit with right to re-file, upholding the contention of the Government that it had the right to dismiss the condemnation action at any time, regardless of circumstances, prior to a taking of the easement for flowage rights over defendant's lands. (Rec. 87).

The United States Circuit Court of Appeals affirmed the decision of the District Court, ordering the dismissal

of the condemnation action, but made no decision on the motion of appellant (there) Matthews to amend his answer. (Rec. 227-236).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

The decision of the Honorable United States Circuit Court of Appeals is in conflict with applicable decisions in this Court, and is in conflict with principles of law established by decisions of this Court.

II.

The holding of the United States Circuit Court of Appeals was contrary to the principles of law established by this Court, because:

(a) The United States of America has no right to dismiss the condemnation suit, under the facts in the case at bar, since such dismissal is contrary to the established principle of law that there is no right to dismiss with right to re-file when suit is brought under a statute directing and commanding that condemnation be had and that there is no right to dismiss a condemnation action when the project in which the lands lie is not to be abandoned.

(b) The written offer made by the Government to purchase the easement for flowage rights over petitioner's lands, and his acceptance of same prior to the filing of the suit, became binding upon the Government when the suit at bar was filed to condemn the easement for flowage rights over plaintiff's lands for the purchase of which the contract had been made, and barred any right to dismiss the condemnation petition.

(c) The motion of appellant (there) A. J. Matthews, Trustee, filed in the United States Court of Appeals for leave to amend his answer alleging the written offer by the United States to purchase the easement for flowage rights over his lands, and acceptance of same by him, should have been granted; and the motion made by Matthews in the District Court for the appointment of commissioners to assess the value of the easement sought to be condemned should have been granted.

(d) Dismissal of the condemnation suit discriminates against appellant, in that the easement for flowage rights over his lands will be taken without compensation to him; whereas, the easement for flowage rights over all the lands in the floodway and in the same situation, within said floodway, as petitioner's land have been paid for by the Government either through purchase or by condemnation.

III.

The United States Court of Appeals has decided the question relating to the construction and application of a statute of the United States erroneously and which has not been, under facts similar to those in this case, settled, but should be settled by this Court.

WHEREFORE, Petitioner prays:

That a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, requiring said Circuit Court of Appeals to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all other proceedings of said Circuit Court of Appeals in this case, styled A. J. Matthews, as Trustee, Appellant vs United

States of America, Appellee, No. 11,694 Civil, to the end that said cause may be reviewed and determined by this Court, as provided by law.

Petitioner further prays that said judgment of said Circuit Court of Appeals be reversed.

SAM COSTEN,

Attorney for Petitioner.

Union Planters Nat'l. Bk. Bldg.

Memphis, Tenn.

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BRIEF

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Eighth Circuit (Rec. 227) is reported in 113 Fed. Rep. (2d) 452; Advance sheet Sept. 2, 1940.

JURISDICTION

Judgment in the Circuit Court of Appeals was entered on the 16th day of July, 1940 (Rec. 236). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925.

The condemnation suit brought herein was authorized under the Act of Congress passed August 15, 1928, and found in 33 U. S. C. A., Secs. 702a-702n.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred in holding:

1. That the motion of plaintiff United States of America to dismiss its condemnation suit with right tc refile should have been granted.

2. In failing to hold and sustain petitioner's motion filed in the Circuit Court of Appeals to amend his answer by setting up the written offers of the United States made prior to filing of condemnation petition herein and acceptance thereof by him to purchase the easement for flowage rights over his lands, lying in the Birds Point-New Madrid Floodway.

3. In holding that under the facts prevailing in the case at bar the condemnation suit should be dismissed because there had been no taking of the easement for flowage rights.

4. In holding that petitioner, by filing suit in the Court of Claims and by filing answer in the condemnation suit, waived his right to insist upon condemnation and was estopped and barred from relying upon the written contract entered into by which the value of the easement for flowage rights over his lands was determined.

5. In holding that under the provisions of the Act, under which the condemnation suit was filed herein, and under the facts prevailing in the case, it was within the power of the Secretary of War to determine that no easement over petitioner's lands was necessary, and that he had the right to order and direct dismissal of the condemnation suit.

6. In holding that under the Findings of Fact of the Court of Claims petitioner has no rights or interest which could be properly condemned under the terms of the Floodway Act.

7. In failing to hold that the motion of plaintiff Matthews, made in the District Court, for the appointment of commissioners in the case at bar to assess the value of the easement for flowage rights over his lands should have been granted.

8. In failing to hold that the declared purpose of Congress, expressed in the Floodway Act of 1928, 33 U.S.C.A., secs. 702a-702n, and the legislative intent as expressed therein, was that the easement for flowage rights over petitioner's lands should be condemned, and that this statute barred the right to dismiss the condemnation petition in the case at bar although there had been no taking of the easement.

9. In failing to hold that when the condemnation suit was filed the written offer of the Government, and acceptance thereof prior thereto by petitioner, to purchase the easement for flowage rights was binding upon the Government and barred the dismissal of the condemnation suit.

10. In failing to hold that the filing of the condemnation suit after filing of the suits by the petitioner Matthews in the Court of Claims, and keeping the condemnation action in force on motion of the Government until after disposition of the said suits of petitioner in the Court of Claims, barred the Government from claiming petitioner had waived his rights under said contract to purchase the easement, and barred the dismissal of the condemnation suit.

SUMMARY OF ARGUMENT

1. The Statute (33 U. S. C. A., sec. 702a-702n) under which the action to condemn was brought directs and commands that the easement for flowage rights over petitioner's lands be condemned and paid for. This bars any right of the Secretary of War to arbitrarily refuse to direct the condemnation of the easement or to direct the dismissal of the condemnation petition.

2. The motion to dismiss, by its own wording, is with the right to re-file. The project of the Birds Point-New Madrid Floodway, in which petitioner's lands lie, is not to be abandoned. This right to re-file the petition, and this purpose not to abandon the project, is a bar to the right to dismiss the condemnation suit.

3. The filing of the suits in the Court of Claims by petitioner (1. An attempt to enforce the contract en-

tered into with the Government for the purchase of the easement for flowage rights; and 2. An attempt to recover under the Tucker Act) did not estop petitioner from relying upon the contract to purchase the easement for flowage rights; nor did it amount to a waiver of his rights under said contract. In neither of the suits did he have any remedy. In the first suit he was attempting to enforce the contract with the Government which he is now relying on; and in the second suit the court did not have jurisdiction and, consequently, he had no remedy in either suit.

4. The Government filed the condemnation petition in the suit at bar after both of said suits had been filed by petitioner in the Court of Claims, and insisted that this condemnation suit remain on the docket for disposition; and by motion from court to court, in the District Court, kept the suit alive and the appointment of commissioners pending, awaiting disposition of petitioner's suit in the Court of Claims. No effort was made to dismiss the condemnation suit until almost a year after the decision of the Court of Claims, in petitioner's suit therein, that that court had no jurisdiction. These acts of the Government effectively waived any right it might have had to claim that petitioner, by filing said suits in the Court of Claims and by his answer in the case at bar, was estopped from relying upon the contract to purchase the easement for flowage rights.

ARGUMENT

GENERAL DOCTRINE AS TO THE RIGHT TO DISMISS CONDEMNATION SUIT

Since the passage of the Floodway Act on May 15, 1928, 33 U. S. C. A., 702a-702n, there has been a maze of uncertainty on the part of owners of land in the Birds Point-New Madrid Floodway, as well as other floodways, as litigants and on the part of their attorneys as to the proper course of procedure, to determine the rights of these owners with respect to enforcement of the payment, under the terms of the Floodway Act, for the value of the easement for flowage rights over the lands. That situation has prevailed with respect to petitioner.

In the case at bar a written offer was made in January, 1932, by the United States to the owner, A. J. Matthews, Trustee, of the land involved, to purchase the easement for flowage rights over his lands which lie in the Birds Point-New Madrid Floodway. This offer was accepted by Matthews in good faith and he supposed the matter was settled (Rec. 186). Later the Government arbitrarily withdrew these offers (Rec. 223) upon the alleged grounds that the offer made was too large in amount, although the offer was not made until full investigation had been made by the Government of the value of the easement, and after President Coolidge had issued an executive order directing the purchase of the easement for flowage rights under a schedule set out in his order. When the offer to Matthews was withdrawn he unsuccessfully attempted to persuade the Government to carry out its contract, and thereafter filed suit in the Court of Claims in an attempt to enforce the contract by a direct action. Demurrer was filed by the Government on the ground that the offer, framed as it was, was effective only after the Government had filed condemnation action and had recommended to the Court, in the

condemnation action, the payment of the amount set out in the offer. Because he could not enforce this contract in the Court of Claims the suit was dismissed without prejudice. At that time no condemnation suit had been filed and Matthews had no way of knowing when one would be filed, if ever. The only alternative he had was to attempt to recover the value of the easement for flowage rights over his lands by action under the Tucker Act in the Court of Claims, filing action under the Tucker Act being limited to six years after the taking. No one at that time knew when it would finally be determined that these easements had been taken. There was ground for the belief that it would be determined that the easement was taken at the date of the passage of the Floodway Act on May 15, 1928; and if it was so held, the right of Matthews to sue under the Tucker Act was limited to six years after the date of the passage of the Act. Consequently, Matthews, with a contract with the Government to purchase the easement for flowage rights, which he felt should be complied with but which he did not know how to enforce, filed action in the Court of Claims under the Tucker Act, on April 10, 1933.

Following this and on August 17, 1933, the condemnation action herein was filed and was held in abeyance under orders of the District Court, where filed, secured upon motion of the Government, until the determination of the suit pending in the Court of Claims (Rec. 82).

At the time of the filing of the condemnation action herein it had not been determined, and the landowner Matthews did not know, that the contract (represented by the written offer of the Government and the acceptance by Matthews) to purchase the easement for flowage rights could be enforced in the condemnation action, and for this reason, and under all the uncertainties which were existing as to proper method of enforcing his rights, he continued with his suit in the Court of Claims—assuming

that since the Government insisted upon keeping the condemnation suit filed, and did so by securing orders from court to court, as to the appointment of Commissioners, that if he failed to establish there had been a taking and to recover in his Court of Claims Action, that the condemnation suit would proceed to conclusion.

The general doctrine as to the right to dismiss a condemnation action is that the right exists up to the time that the property sought to be condemned has been taken. However, the case at bar comes within several well-defined exceptions to this right to dismiss, even though there has been no taking: (1) The Floodway Act, under which the suit at bar was brought, shows a positive legislative intent that the easement for flowage rights over plaintiff's lands shall be condemned, and this precludes condemnor from dismissing the action after same was filed. (2) The Birds Point-New Madrid Floodway has not been abandoned and this precludes the right to dismiss the suit. (3) By reason of the offer and acceptance to purchase the easement, the right of the owner, Matthews, to compensation for his property has become complete, upon the filing of the condemnation action before the motion to dismiss was made, and the duty was imposed on the condemnor to proceed.

When a condemnation action has been filed and a taking has occurred, no right exists to dismiss the condemnation action. In many circumstances it has been held that whether or not there has been a taking, is determinative of the right to dismiss. In many decisions it is held that the Government can dismiss a condemnation action at any time before taking occurs. We insist, however, that the decisions have assigned a number of reasons and a number of conditions which void the right of the Government to dismiss a condemnation suit, even though, at the time the motion to dismiss is made, a taking has not occurred, and that situation prevails in the case at bar.

I.

THE DECLARED PURPOSE OF CONGRESS IN THE FLOODWAY ACT OF 1928 AND THE LEGISLATIVE INTENT EXPRESSED IN THAT STATUTORY PROVISION WAS THAT THE EASEMENT FOR FLOWAGE RIGHTS OVER PETITIONER'S LANDS SHOULD BE CONDEMNED.

It is the declared purpose of Congress, as expressed in the Floodway Act, that this floodway improvement shall be made in accordance with the adopted plan; that the Birds Point-New Madrid Floodway is an integral part of the improvement; that since defendant's lands lie within the floodway area as designed, and as constructed by the Government, and since the floodway cannot be operated without submerging these lands, it became mandatory upon the Secretary of War to provide the necessary flowage rights over them, either by donation, purchase or condemnation; that since the necessary flowage rights over the lands in question have not been acquired by gift or by purchase, it became his absolute duty to proceed by condemnation, and having once entered upon the discharge of his duty by the commencement of such condemnation proceedings, it would be contrary to the intent of Congress to permit him to discontinue the proceedings in his arbitrary discretion.

An examination of the cases holding that the Government has the right to dismiss condemnation actions at any time before a taking of the property discloses that they (1) were all cases where the public authorities were proceeding under some general grant of power in eminent domain to be exercised or not exercised in discretion, or where the power was to be exercised, not against any particular lands but against such lands as the public authori-

ties might, in their discretion, select for the public use; (2) they will, furthermore, all be found to have been cases in which discontinuance was sought, either because the improvement had been in good faith, and permanently abandoned, or where the project had been permanently and in good faith surrendered as to the particular lands in question, without intent to commence anew; (3) and in none of these cases was there anything in the statute or enabling act which, either expressly or by implication, prohibited such permanent abandonment of the improvement, or such permanent surrender of the property so far as the particular lands involved were concerned.

Thus, for example, in KANAKANUI, et al vs. UNITED STATES, 244 Fed. 923, the officers of the Government in the exercise of their general power of eminent domain instituted proceedings for the condemnation of certain property for military purposes. Subsequently they abandoned the project and the proceeding was held to have been properly discontinued.

In the case of IN RE: LIGHTHOUSE AT HELL'S GATE, 196 Fed. 174, the United States was proceeding under general powers in eminent domain to condemn certain lands below high water mark as a site for a lighthouse. The law officers of the Government discovered that the United States had a right to use the land for that purpose without making compensation and it was held to be proper for the court in its discretion to vacate an order of condemnation which had previously been entered.

To the same effect is LAWRENCE WARD'S ISLAND REALTY, CO. vs. UNITED STATES, 209 Fed. 201 where the Government had instituted proceedings to condemn a site on Ward's Island for a light and fog signal station, but subsequently discovered that they had a paramount right to take the premises without compensation because of their location between the high and lower

water line in East River, and an Order made by the Court granting discontinuance of the proceedings was held not to have been an abuse of discretion.

In OWEN v. UNITED STATES, 8 Fed. (2d) 992, a condemnation proceeding had been commenced under general powers of eminent domain in connection with a reclamation project. The proceedings were so much delayed by the land owners contesting the right to condemn and by their objections to the amount of the award, that the Government completed the project by using other lands and thereupon obtained a discontinuance of the pending proceeding.

In JOHNSON & WIMSATT, INC., v. REICHELDERFER, 66 Fed. (2d) 217 the proceeding was for the condemnation of a school site under general powers of eminent domain. The Government was dissatisfied with the amount of the award and abandoned the project so far as the particular lands were concerned. It was held that where land is sought to be taken for a public purpose the public authorities, in the absence of any statutory provisions to the contrary, have a reasonable time given them to decide whether to accept or refuse the land at the price fixed and that it would be intolerably unreasonable to require them to proceed when they find the cost excessive.

The Court, in the case of Danforth v. United States, 308 U. S. 271, was considering when the payment of interest would begin, when it said "until taking, the condemnor may discontinue or abandon his efforts." The Court was not considering the right of the Government to dismiss its condemnation action in that suit. Immediately following the above quoted statement in the Danforth case, the Court said: "The determination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of

eminent domain an opportunity to determine whether the valuation leaves the cost of completion within its resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost."

The contract to purchase determined the cost of the easement in the case at bar, and the reason for dismissal of the condemnation action because the cost, when determined, exceeds what the Government, as condemnor, expected, no longer exists and it no longer has the right to dismiss the suit upon that ground. The plain inference, from the Danforth decision, is that if the Court had been considering a motion to dismiss the condemnation action, it would not have permitted dismissal.

Wachovia v. Hardiman, 98 Fed. (2) 609.

In the case at Bar, the public authorities are not proceeding under some general grant of power in eminent domain, leaving it discretionary with the Secretary of War whether to condemn or not to condemn, or whether to condemn the particular lands of this petitioner or some other lands. They *must* condemn and no choice or discretion is given them as to what particular lands shall be condemned. That was determined when the area and boundaries of the floodway had been definitely fixed by the erection of the set-back levee.

We regard these several propositions as incontrovertible, both in point of fact and in point of law. It cannot be successfully denied, that, by the Act of May 15, 1928, Congress commanded the making of the public improvement embodied in the Jadwin Plan for the control of floods in the alluvial valley of the Mississippi River. The Plan provided for the erection of the Birds Point-New Madrid Floodway. Petitioner's lands lie in this floodway. The easement for flowage rights has been acquired over all lands in the floodway except petitioner's.

Title 33 U. S. C. A. Sec. 702a-10
Title 33 U. S. C. A. Sec. 702c
Title 33 U. S. C. A. Sec. 702d

There can be no question of the intent of statute 702d. The wording of the statute is that "the United States *shall provide* flowage rights for additional destructive floodwater * * *". The statute does not leave it to the discretion of the Secretary of War or of the Attorney General, but commands that the flowage rights shall be *provided.* The statute uses the word "provide". The ordinary meaning of the word "provide" and the one stated in Webster is, 'to take measures in view of an expected or possible need"; "to make ready", "to prepare". The statute therefore contemplates that "the United States *shall provide* flowage rights for additional destructive floodwaters * * *," in anticipation of the need to use those flowage rights and not after the easement has been taken by the Government.

Section 702d, provides that Sections 594 and 595 apply to the acquisition of easements. Section 594 provides that when condemnation proceedings are filed, the Government has the right to take immediate possession of the easements, with the further provision that adequate provision be made for the payment of compensation to the owner by deposit in court, or such like. This section also has this provision:

> In every case, the proceedings in condemnation shall be *diligently prosecuted* on the part of the United States, in order that such compensation may be promptly ascertained and paid."

(Throughout this brief italics are ours)

Where the legislative intent is positive in its provisions that property shall be condemned, the right to dismiss condemnation proceedings does not exist.

People, ex rel, Canavan v. Collins,
20 App. Div N. Y. 341, 46 NYS. 727.

Johnson & Wimsatt v. Reichelderfer,
supra.

36 *Opin. Atty. Gen.* 80.

In this opinion (36 Opin. Atty. Gen. 80) the Attorney General stated that this floodway plan, including the Birds Point-New Madrid Floodway, was fixed and that this included "the obligation to provide flowage rights and to make compensation in connection therewith." This construction of the Act by the Attorney General was approved in SPONENBARGER vs. UNITED STATES, 101 FED. (2d) 506.

It may be further granted that where statute authorizes condemnation of a class of property for public purposes and designates some official or board to determine what property is necessary to be condemned, that this involves legislative authority and is not subject to judicial review, but Section 4 of the Floodway Act is positive in its provisions that flowage rights shall be provided over lands lying in floodways designated by the Act. Necessarily, the floodwaters of the river diverted in these floodways, would pass over all the lands therein. In the case at bar the lands of appellant lie in the middle and lower part of the floodway, and the upper fuseplug, where the waters would come in, is at the upper end of the floodway. When the Floodway Bill was passed the Jadwin Plan was adopted and made a part of it (Sec. 702a-1½). The Jadwin Plan provided for the Birds Point-New Madrid Floodway, but located only generally the set-back levee which enclosed the floodway on the west. Since the Act, 702d, contemplated that easements for flowage rights would be provided in advance of the completion of the floodway; and since the Act and the Jadwin Plan did not definitely locate the set-back levee, the Act further clothed the Secretary of War and the Chief of Engineers, when they de-

termined that certain lands were necessary on which levees should be built or ditches should be constructed, or what lands should be included within the floodway, with authority to institute condemnation proceedings, The definite location of the boundaries of these floodways, the location of the levees to be built, and the ditches to be constructed, depended upon the opinion of the Secretary of War and the Chief of Engineers, as they were located only generally in the Act and in the Jadwin Plan. The matter delegated to the Secretary or War and the Chief of Engineers was the definite location of the limits of the floodway. When the floodway was located, the limitation of the lands included therein was determined.

The Act by its provisions did not delegate to the Secretary of War and the Chief of Engineers, the authority or the right to pick out the lands of one landowner in the Birds Point-New Madrid Floodway or in the right of way for a ditch or levee and say that easement over his lands was not necessary in the carrying out of the project, when at the same time lands adjacent or completely surrounding and all other lands in the floodway were determined by him to be necessary in carrying out the project.

Cases where the discretion delegated was to be exercised under a situation where the Act had not determined what property should be acquired are not applicable in the case at bar. Here the Act itself determines what easements are necessary to be acquired, and only leaves to the discretion of the Secretary of War and the Chief of Engineers, the engineering features of locating the boundaries of such lands.

If counsel be correct in his argument, then the lands over which the set-back levee was built could have been condemned in part, condemnation suit filed against the balance and dismissed because the Secretary of War advised that it was not necessary to proceed with the condemnation.

The purpose of this floodway, as defined by the Act itself, was to be filled with water to protect the City of Cairo, and could only mean that all of the lands within the floodway would be deeply covered with additional waters from the river. Pursued to a conclusion, the argument that the Secretary of War can arbitrarily determine whose lands shall be condemned would lead to an absurd position. The delegated power to the Secretary of War then could be used to select A's lands which were immediately adjacent to B's lands, as necessary for the floodway, and refuse to select B's lands. Plainly, under the Act the power delegated to the Secretary of War and Chief of Engineers was to select the confines of the floodway, and did not give them the power to arbitrarily select certain lands in the floodway as necessary, and adjacent lands in the same situation as unnecessary.

In the case at bar it is sought to invoke an administrative determination of the Secretary of War to determine the Government's right to dismiss the condemnation suit and not an administrative determination of the necessity of using appellant's lands in the floodway. Any determination of the Secretary of War with reference to the necessity of using plaintiff's lands in the floodway would not take the lands out of the floodway or change the fact that they are in and a part of the floodway. The necessity to use them was determined when they were located in the floodway and was verified by the Secretary of War when the offer was made to purchase the easement over them, when he authorized the condemnation of the balance of the lands, and when the suit was filed in this case to condemn the easement over them.

When the final plans and specifications were adopted and the locaiton of the set-back levee was finally determined, it was, in legal effect, under the Act of Congress, a specific direction that flowage rights be acquired over the lands in the floodway.

The right to dismiss condemnation proceedings is not absolute and should not be allowed except on sound reasons.

In Re: Lighthouse at Hell's Gate, supra.
20 C. J., 1078.

"The abandonment must be in good faith and must be a complete surrender of the project so far as the land involved is concerned."

City of Evanston v. Clark, 77 Ill. App. 234.

"While a municipal corporation may, after judgment in condemnation proceedings, abandon the improvement, such abandonment must be in good faith. A municipal corporation can not, under pretense of abandonment, repeal the ordinance ordering an improvement, and then take possession of the premises condemned and use it for the purpose contemplated by the repeal ordinance and the condemnation proceedings, and thus defeat the right of the property owner as adjudicated in the condemnation proceedings."

Robertson v. Hartenbower, 120 Iowa, 410.
94 N. E. 857.

Rogers v. City of St. Charles, 3 Mo. App. 41.

II.

THE MOTION FOR DISCONTINUANCE OF THE PROCEEDING MUST BE MADE IN GOOD FAITH COUPLED WITH AN INTENTION TO ABANDON THE PROJECT FOR WHICH THE EASEMENT FOR FLOWAGE RIGHTS OVER THE PETITIONER'S LANDS IS REQUIRED AND WITH AN INTENTION NOT TO RE-FILE THE CONDEMNATION PETITION.

The motion in the case at bar to dismiss is not sought because the authorities have in good faith permanently abandoned the improvement or have in good faith permanently surrendered the project as to the particular lands in question. On the contrary, plaintiff desires to reserve the right to commence new proceedings, which, of necessity, it must do, because it is not within the power of the Secretary of War either to abandon the improvement or to surrender the project so far as petitioner's lands are concerned . The Act, if not expressly, at least by necessary implication, prohibits an abandonment of the improvement or a surrender of the project.

The decisions are clear that "bad faith" when a condemnation suit is sought to be dismissed, means, at least, one of several things: If it is the intention to refile the action, then it is bad faith for the condemnor to dismiss and delay payment to condemnee and place him to the additional trouble and expense in the matter. The motion itself in this case provides for refiling. In its own words, it asks for a dismissal "with the right to refile." The decisions are further clear that when the Government files a condemnafion action, it has no right to dismiss, and its effort to do so is in bad faith, unless it was the intention to abandon the project for which the property was sought to be condemned. It is positive that this project will not be abandoned and there is no intention of

abandoning same and no claim is made that the project will be abandoned, and no reason is assigned for asking the dismissal of this condemnation suit except upon the alleged technical ground of the Government's right to do so.

The Court of Claims' decision did not pass title to the Government, and it does not own this easement and the only method for it to secure it is by this condemnation action. It must either acquire the easement as the statute commands or the position is that since it can have the use of the easement without acquiring or paying for same, it will do so. It is here claimed that condemning the easement over petitioner's lands is useless in view of the decision in the Court of Claims denying compensation, and that this is justification for the abandonment of the condemnation proceedings and shows it was not in bad faith. The reason for denying compensation in the Court of Claims was that there had been no taking,—the opinion of the Court in that decision clearly showing that there had been damages. The fact that there had been no taking has no application in the case at bar, nor is it any support for the position that the easement should not be condemned and paid for. The Court of Claims' denial of compensation was because of lack of jurisdiction to do so.

NEW YORK CENTRAL & H. R. R. CO. v. MARSHALL, 127 N. Y. App. Div. 534. This case held the right to dismiss condemnation proceedings is not absolute and was not allowed when the motion was made long after the report of the commissioners had been confirmed.

IN RE: LIGHTHOUSE AT HELL GATE, 196 Fed. 174, 20 C. J., 1078:

> "The abandonment must be in good faith and must be a complete surrender of the project so far as the land involved is concerned."
>
> City of Evanston v. Clark, 77 Ill. App. 234.

ROBERTSON v. HARTENBOWER, 120 IOWA, 410; 94 N. E. 857. In this case it was held that the city could abandon condemnation proceedings where the same was in good faith and included the entire proceedings, and the project in which the land was involved, but the Court held that such abandonment must be in good faith, and said:

> "A condemnation of private property by a city may be abandoned where the same is in good faith and includes the entire proceedings, but if there is not such a good faith abandonment, the findings of the sheriff's jury or of the trial jury on appeal constitutes an adjudication binding upon the condemnor. * * * *
>
> "* * * * * the abandonment contemplated by the statute, and by the authorities which we have been able to examine, is an abandonment in good faith of the entire proceedings and of the land for the purpose for which it was bought. In other words, it must be a complete surrender of the project so far as the land involved is concerned."

Rogers v. City of St. Charles, 3 Mo. App. 41.

III.

THE RIGHT OF PETITIONER TO COMPENSATION FOR EASEMENT HAS BECOME COMPLETE AND ABSOLUTE AND BARS THE RIGHT TO DISMISS CONDEMNATION SUIT.

On January 14, 1932, a written offer was made by the War Department of the United States to Matthews, Trustee, to purchase the easement for flowage rights over the lands held by him as trustee, and described in the complaint, and this offer was accepted by him in writing. This offer to him was the same offer and made at the same time, as were offers made to the other land owners in the Birds Point-New Madrid Floodway, and is the same except of course as to the description of the lands and the

amounts offered, as was made to Wm. H. Danforth, which was considered and decided by the United States Supreme Court in the case of DANFORTH v. UNITED STATES on December 4, 1939, 308 U. S. 271.

(1) It is generally held that unless the statute giving the right to condemn requires that pleadings be filed by the defendant, the rights of defendant, unless it deals with special damages, are preserved and, without pleading, he has a right to offer evidence in support of his right to recover compensation for the property sought to be taken by the condemnation.

20 C. J., p. 959, par. 369; p. 961, par. 370.

> "Although it is usually unnecessary, in order to determine the rights of the parties, for defendant to file a plea or answer, unless he claims special damages, and although in some cases it is not permitted, it is nevertheless generally permissible to file one within the proper time. * * * * .
>
> "A reply is not needed unless it would be requisite under the ordinary practice provided by statutes."

The Floodway Act passed on May 15, 1928, Title 33 U. S. C. A., 702, makes no requirement that defendant file any pleading in condemnation actions brought under this Act.

In 702d a provision is made that the United States, through the War Department, may purchase easements for flowage rights over lands in the Birds Point-New Madrid Floodway, but makes no requirement that a land owner shall plead an agreement to make such purchase in condemnation suits brought to consummate such agreements.

Under the statutes and practice in Missouri no answer or other form of pleading is required of the defendant in condemnation cases.

Springfield S. Ry. Co. v. Calkins, 90 Mo. 538; 3 S. W., 82. In this case the Court held that:

> "There is, we apprehend, nothing in our statute or practice requiring an answer or other form of pleading by a defendant in cases of this sort (condemnation proceedings). Chicago M. & St. Paul Ry. Co. v. Baker, 102 Mo. 553; 15 S. W. 63, West End Narrow Gauge Ry. v. Martin Almerath, 13 Mo. App. 91."

The condemnation actions herein filed by the United States, following the offer and acceptance constituting an agreement as to the amount to be paid for the easement over appellant's lands, was an action to which the appellant Matthews was not required to plead in order to have available the right to prove the contract to purchase the easement. So far as we have been able to determine, there is no federal statute, either in the 1928 Act or elsewhere, requiring a defendant in a condemnation action to plead any cross-claim which he may have,—the general rule being that the procedure in each case is governed by the provisions of the particular statute under which the condemnation proceeding is instituted.

(2) The general rule is that condemnation actions, where the defendant has a counter claim, cannot be dismissed unless the defendant can prosecute his right under the counter claim indpendent of the condemnation action.

9 R. C. L., p. 202, Sec. 18.

While there are some decisions to the contrary, the great weight of authority is that the plaintiff does not have the right to dismiss the condemnation action where the counter-claim has been interposed.

Note 15 L. R. A. (N. S.), page 342.
18 C. J., par. 33, p. 1159.
18 C. J., par. 34, p. 1161.

Rule 12, sec. (b) New Federal Rules of Civil Procedure.

Rule 41, section (a) of the New Federal Rules of Civil Procedure provides:

> "By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a **counterclaim** has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

(3) The written contract entered into between appellant Matthews and the United States, through the War Department, by which it was agreed what he should be paid for the easement for flowage rights over the lands described in the condemnation suit, constituted a right to Matthews, as a property owner, to compensation or damages for the easement, and his right by the contract became complete.

20 C. J., p. 1077, par. 457.
20 C. J., p. 1079, par. 458.

Quoting from the above (20 C. J., par. 458):

> "The general rule is that condemnation proceedings may be dismissed or abandoned at any time before, but not after, the landowner's right to compensation has become vested. Even though title has not vested in the condemnor, the right to dismiss is precluded where the landowner's right to compensation is complete."

In the case of Bardstown & L. Turnpike Co. v. Nelson County, 109 Ky., 800; 60 S. W., 862, the County was authorized by the statute to acquire the turnpike road by gift, lease, purchase, or contract, and they made a written proposition to the Turnpike Company, which was

accepted, and the Court held that the contract was binding and that the authority given the county by statute to abandon such condemnation proceeding at any time did not confer upon it the right to abandon the proceeding after it had made the written contract to purchase.

In Re: Southern Boulevard R. Co., 17 N. Y. S. 828. In this case an agreement was entered into with reference to a condemnation action and the Court held that the condemnation action could not be dismissed, saying:

> "It seems to us * * * that even if under ordinary circumstances the appellant might have an absolute right to discontinue, yet the respondents having acquired rights which would thereby be imperiled, such absolute right (to dismiss) was voluntarily relinquished by appellant (railroad company)."

In the case of DANFORTH v. THE UNITED STATES, supra, the Court held that an offer made at the same time that the offer was made to appellant Matthews, for easement for flowage rights over lands lying within the Birds Point-New Madrid Floodway, constituted an agreement fixing the price for the easement sought, and that the offer shows that condemnation was in mind,—the Court holding that:

> "The effect of such an agreement is to fix the value of the easement when the authority of the court is invoked against a party to the agreement to acquire good title."

In the case at bar, when the United States, through the War Department, made a contract with Matthews, Trustee, to purchase the easement for flowage rights over the lands described in the complaint, and when this condemnation suit was filed, thereafter the right of Matthews to compensation became fixed and complete and, no right remained to dismiss the condemnation suit.

FINDINGS OF FACT OF THE COURT OF CLAIMS

The judgment in the Court of Claims, does not operate as a bar to the maintenance of the condemnation proceeding and does not operate as an estoppel with respect to the issue of damages, because: (1) The condemnation suits in the case at bar and the suit filed by Matthews in the Court of Claims are not the same cause of action; (2) the Court of Claims in fact decided nothing in respect to damages; (3) any decision of the Court of Claims with respect to damages, if made, would have been in excess of the court's jurisdiction and void; and (4) the requisite mutuality to create an estoppel by judgment is lacking, in that the United States would not be concluded by judgment if the Court of Claims had decided that there was no taking but that Matthews had been damaged by the erection of the floodway.

The suit instituted in the Court of Claims was for the recovery of compensation under the Fifth Amendment to the Federal Constitution as for the taking or appropriation by the Government of a flowage easement over his lands situate in the Birds Point-New Madrid Floodway. It was the claim of Matthews in that suit that by the adoption by Congress of the Act of May 15, 1928, and/or by the construction of the set-back levee and/or other acts of the agents of the Government claiming to act by authority of the Flood Control Act, the United States had "taken" a flowage easement over his lands, and thereby had impliedly promised and agreed to compensate him therefor, under the provisions of the aforesaid Fifth Amendment to the Federal Constitution. The Government made answer by way of a general denial. At the trial Matthews offered certain evidence which he claimed sufficed to establish that the United States, prior to the institution of his suit, had "taken" a flowage easement over his lands for the purpose of the floodway, and

certain other evidence which tended to show that the value of his lands had been depreciated by the alleged taking.

The Government offered certain evidence by which it sought to establish that there had been no appropriation of a flowage easement by the United States prior to the institution of the suit and that if there was a taking a less amount of damage had been inflicted than was claimed. The Court of Claims, in conformity to its own rules and the rules of the United States Supreme Court, made a series of Findings on both of these issues. The Court of Claims concluded, as matter of law, that the plaintiff was not entitled to recover, and that the petition of Matthews should be dismissed. The Court with its Findings of Fact and Conclusions of Law and Order for Judgment, handed down an opinion (purporting to review the evidence) in the case, and concluding that:

> "Upon the facts disclosed by the record and under the decisions cited, we are of opinion that there has been no taking by the United States of plaintiff's property or property rights for which recovery can be had under the Fifth Amendment. The petition is, therefore, dismissed. It is so ordered." (Rec. 175).

During the pendency of Matthews' suit in the Court of Claims, on August 17, 1933, the United States instituted this condemnation suit against Matthews and others in the above court for the condemnation of a flowage easement over Matthews' lands in the Birds Point-New Madrid Floodway pursuant to the Act of May 15, 1928, and this was the first opportunity petitioner had to enforce the contract made with the Government for the purchase of the easement. By order of the District Court the condemnation proceedings and the appointment of commissioners were stayed pending the determination of Matthews' suit in the Court of Claims.

Upon this state of the record, we are unable to under-

stand how the decision in the Court of Claims has become res judicata of any matter in the case at bar except the taking, or how it operates as a bar to any further prosecution of the condemnation proceedings.

The decision of the Court of Claims determined nothing in respect to the damages sustained or to be sustained by Matthews from the erection or operation of the floodway, and is not res judicata upon any issue involved in these condemnation proceedings except that there has been no taking of the easement.

The Supreme Court of the United States, in the case of TAIT v. WESTERN MARYLAND RAILWAY COMPANY, 289 U. S., 620, 623; 77 L. Ed. 1405, defined the scope of the doctrine of res judicata:

> "The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand, or upon a different claim or demand. In the former case a judgment on the merits is an absolute bar to the subsequent action.. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action."
>
> Troxell v. Delaware, Lackawanna & Western R. R. Co., 227 U. S. 434; 57 L. Ed. 586.

(1) The condemnation action in the case at bar is not the same cause of action as the suit filed by appellant Matthews in the Court of Claims. The Court of Claims suit was a personal action and the cause of action was upon an implied contract, while the case at bar is a suit in rem to condemn an easement.

> Veeder v. Baker, 83 N. Y. 156, 160.
>
> Goodrich v. Alfred, 43 Atl. 1041, 72 Conn. 257.

Harvey v. Parkersburg Ins. Co., 37 W. Va. 272, 16 S. E. 580.

McArthur v. Moffett, 143 Wis. 564.

Mercantile Trust & Deposit Co. v. Roanoke & S. R. Co. 109 Fed. 3, 8.

United States v. Great Falls Mfg. Co. 112 U. S. 645, 656; 29 L. Ed. 846.

It was necessary, in Matthews' suit in the Court of Claims to show there had been a taking in order to establish an implied promise on the part of the Government to pay and in order to have any cause of action or any recovery.

In the condemnation action the proceeding is in rem against, presumably, an unwilling owner. It is not necessary that a taking of the property have occurred. The purpose of condemnation is to ascertain the value of the property and the compensation to be paid preliminary to the taking. The right of defendant to recover damages in the condemnation suit is not predicated upon the contract, either express or implied, as was the case in the Court of Claims suit.

Mason City & Ft. Dodge R. R. Co. v. Boynton, 204 U. S. 570; 51 L. ed. 629.

Van Bronklin v. Anderson, 117 U. S. 151; 29 L. ed. 845.

United States v. Jones, 109 U. S. 513; 27 L. ed. 1015.

Lincoln Northern Ry. Co. v. Wiswell, 8 Cal. App. 578, 97 Pac. 536.

Since these two cases were different causes of action, an adjudication in the one constitutes no bar to a recovery in the other.

County of Mobile v. Kimball, 102 U. S. 691, 705; 26 L. ed. 238.

The Court of Claims' decision was a judicial determination that, up to the time of commencement of that suit the United States had *not* appropriated or taken a flowage easement. That, necessarily left it open to the Secretary of War to acquire an easement by condemnation, as he is in duty bound to do.

(2) The Court of Claims in fact decided nothing in respect to damages.

It did make various findings bearing upon "Damages" based specifically on the fact there had been no taking. However, findings alone do not constitute an adjudication. The findings must be carried into the judgment.

In **Bassick Mfg. Co. v. Larkin Automotive Parts Co. 19 Fed. (2d) 939, aff'd Larkin Automotive Parts Co. v. Bassick Mfg. Co. 19 Fed. (2d) 944,** the court said:

> "The force of estoppel in a prior adjudication lies in the judgment itself, and it is not the finding of the court or verdict of the jury which concludes the parties."

In **Pinkus v. Pinkus, 244 N. Y. S. 652** the court said:

> "Findings of Fact and Conclusions of Law are not res judicata unless followed by a judgment based thereon relevant to the issues."

In **Societe etc. v. Mumm Champagne Importation Co. 10 Fed. Supp. 289,** the court said:

> "To make matters res judicata the cause must go to judgment or decree, the court's decision or opinion being insufficient."

In **Mitchell v. Insley, 33 Kan. 654, 7 Pac. 201,** the court said:

"Findings of Fact of the trial court cannot be considered an adjudication or used as evidence unless some other ground can be found for its use than merely that it is a finding of the court.

"A finding is an adjudication only as it is given effect in a judgment."

Lynn v. McCue, 94 Kan. 761, 147 Pac. 808, rehearing denied 96 Kan. 114, 150 Pac. 523.

"Where a finding in a former action is not only without the issues but no attempt is made to carry it into the judgment rendered, it is not res judicata."

Trook v. Crouch, 137 N. E. 773, 32 Ind. App. 309.

Smith v. McCool, 83 U. S. (16 Wall) 560, 21 L. ed. 324.

The judgment which the Court of Claims rendered on its special findings was simply, that the petition be dismissed because there had been no taking. There is nothing in the judgment itself to indicate to what extent the findings were carried into the judgment or upon what ground the dismissal proceeded, except that there had been no taking of the easement.

It is well settled, however, that before there can be an estoppel by judgment it must be certain that the precise fact in question was determined by the Court in the prior action.

In **DeSollar v. Hanscome, 158 U. S. 216, 39 L. Ed. 956,** the court said:

"It is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment."

Russsell v. Place, 94 U. S. 606, 608, 610, 24 L. ed. 214.

A strongly corroborative, if not conclusive circumstance, that none of the Findings relating to damage were carried into the judgment and that the Court of Claims intended to decide nothing on the question of damage, is to be found in this, that the Court in and by its 22nd and other Finding (Rec. 165) affirmatively found that Matthews did sustain damages.

Clearly, damage was found, yet no judgment was rendered therefor. In other words, the findings relating to damages "were not carried into the judgment"; and, therefore, under the cases cited could not become res judicata. Any and all damages which plaintiff could recover in that case necessarily were based upon the fact that his property had been taken.

The Court of Claims held there had been no direct invasion, from any act of the Government, of the Matthews land, and that there was therefore no taking: consequently, no implied contract, no right of recovery on the part of Matthews, and no jurisdiction of the case in the Court of Claims.

The Court of Claims further impliedly found that there was damage to the lands from an agricultural standpoint, but since there was no taking there could be no recovery.

(Finding No. 22 Rec. 166).

An examination of the Findings of Fact of the Court of Claims shows conclusively that it was not attempting to determine there was or was not damage to the property, or, in other words, that there was or was not depreciation in the market value of the property but that such depreciation in the market value could not be recovered because there had been no taking. This is also clearly shown when the Court said (Rec. 164) that the amount of the depreciation in the market value because

of the property being placed in the Floodway did not satisfactorily appear from the evidence; that is, how much of it was due to the depression and how much to the Floodway. If it had been the intention of the Court of Claims to have made a finding that there was no depreciation in the market value of this property by reason of placing it in the Floodway, it would have in that finding so stated.

Petitioner's lands are completely surrounded by lands in the same situation so far as elevation and backwater conditions are concerned. The decision in the Court of Claims has no bearing upon the provisions of the Flood Control Act that the Government shall condemn, and/or shall purchase or shall have donated to it, an easement for flowage rights for the floodwaters of the river, over all the lands within the Birds Point-New Madrid Floodway, and, the statute being mandatory in character, the Government has no choice but to file condemnation suits promptly and pursue them diligently. The Government is not justified, either legally or equitably, under the statutes and under conditions prevailing in this case, to own the easements and pay for same over all the lands in the Birds Point-New Madrid Floodway except one landowner and, in the case at bar only because this petitioner was mistaken in his remedy and filed suit in the Court of Claims, where he had no remedy and which court had no jurisdiction. If these suits are dismissed, this petitioner is without remedy.

When one is mistaken (as petitioner was in his suit in the Court of Claims) as to his remedy and files suit in a court where he has no remedy, and in a court which has no jurisdiction, it does not amount to an election of remedies or an abandonment of the proper remedy.

Zimmerman v. Hardiman, 227 U. S. 609;
27 L. ed. 608.

Hawkins v. Dannenberg Co., et al.,
234 Fed. 752.

Hartwig v. Ins. Co., 167 Mo. App. 128;
151 S. W. 477.

(3) The Court of Claims is a court of limited jurisdiction. It has jurisdiction in claims against the Government under the Tucker Act only when there has been a taking and, consequently, an implied contract is involved. If there is no taking and no implied contract, the Court of Claims is without jurisdiction. The taking can only occur when there has been a direct invasion.

United States v. Klein, 13 Wall (U.S.)
128, 20 L. ed. 519.

United States v. Gleason, 124 U. S. 255
31 L. ed. 421.

Johnson v. United States, 160 U. S. 546,
40 L. ed. 529.

Thurston v. United States, 232 U. S. 469,
58 L. ed. 688.

Any Findings of the Court of Claims as to damages upon a hypothetical taking are void. If the Court had found a definite amount of damages to the property and at the same time found there was no taking, the Finding as to the damages would have been void and would have been in excess of its jurisdiction.

15 C. J. 729, Sec. 26.
15 C. J. 824, Sec. 135.
33 C. J. 1076, Sec. 37.

Winsor v. McVeigh, 93 U. S. 274,
53 L. ed. 914.

In **National Exchange Bank v. Wiley, 195 U. S., 257, 270, 49 L. ed. 184,** the Court said:

"The effect of every judgment must depend upon the power of the court to render **that judgment.**"

Semmes v. United States, 91 U. S. 21,
23 L. ed. 193.

In **People Ex Rel Carlstrom v. Shurtleff, 355 Ill. 210 189 N. E. 291,** the court said:

> "Where it develops in the course of proceeding that the court does not have jurisdiction in the particular case, any order except one dismissing proceeding is void."

In **Martin v. Barth, 25 Fed. (2d) 95,** the court stated that the desire to dispose of a controversy on its merits cannot justify ignoring jurisdictional limitation.

Peay v. United States, 19 Ct. Cl. 77.

Birdsong v. United States, 34 Ct. Cl. 437.

In Re Braver, 51 Fed. (2d) 123, aff'd 59 Fed. (2) 905.

Cizek v. Cizek (Neb.) 96 N. W. 657, reversed on rehearing in 99 N. W. 28.

As in the case of **O'Neal v. Diamond A. Cattle Co. (S. D.) 260 N. W. 836,** so in the Matthews case in the Court of Claims, when it developed on the trial that there had been no taking, the court had jurisdiction only to dismiss the proceeding and was without jurisdiction to determine the question of damages.

As in the case of **Murray v. Pocatello, 226 U. S. 318, 57 L. ed. 239,** so in the Court of Claims case, when it appeared there had been no taking, the court had no power to grant relief, whatever the question of damages on the merits might be, and it could not decide what the merits were. To decide anything on the merits as to damages after the court determined it had no jurisdiction, amounted to deciding an abstract question, one wholly immaterial and not necessary to a decision in the case—all of which things the court had no right or power to do.

Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 80 L. ed. 688.

(4) The requisite mutuality to create an estoppel by judgment is lacking in that the United States would not be concluded by the judgment if the Court of Claims had decided that there was no taking but had given judgment for Matthews for damages.

15 R. C. L. p. 956, Sec. 432.

The principle is stated in **Bluefields S. S. Co. Ltd. v. United Fruit Co., 243 Fed. 1, Writ of Error dismissed 248 U. S. 595, 63 L. ed. 438**, where the court, after having held that the rule of res judicata was not applicable under the circumstances in that case, stated:

> **"This is upon the principle that no one can take advantage of a judgment or decree if he would not have been prejudiced by it if it had been otherwise."**

RIGHT OF PETITIONER TO AMEND ANSWER

Petitioner's motion to amend his answer setting up the written offer of the Government to purchase the easement for flowage rights over his lands, and his acceptance of same, was not made until this cause had been appealed to the United States Circuit Court of Appeals. It was not determined until the decision in the case of William H. Danforth v. United States, 308 U. S., 271, that these contracts were enforceable in condemnation actions, and this decision was not handed down until after the appeal of the case at bar to the Circuit Court of Appeals had been perfected.

It is clear from the decisions, when it appears to the Court that justice, under the particular facts in the case involved, requires it, amendment to pleadings will be permitted in the Appellate Courts.

Jones v. Meehan, 175 U. S. 1;
44 L. ed. 49.

It would seem that petitioner's right, in the case at bar, to rely upon the contract with the Government did not require that he allege same in his pleading to the condemnation petition; but if that is necessary, justice would seem to require that he be permitted to amend, alleging the contract by which the Government agreed to purchase the easement for flowage rights over his lands. He was entirely without knowledge, until the decision in Danforth v. United States, supra, that the contract to purchase the easement was a contract binding upon the Government in the condemnation action.

United States v. Gideon Anderson, et al,
16 Fed. Supp. 627.

The New Federal Rules regulating Civil Procedure in the Federal Courts clearly provide that Appellate Courts are authorized to permit amendments to pleadings where same is necessary to prevent a litigant from being deprived of his clear rights, and they also provide that the courts are authorized to be liberal in this respect where it is necessary to attain the ends of justice. If pleading same is necessary, unless petitioner is permitted to plead his counterclaim, based upon the contract with the Government, he will be deprived of this clear right only because he could not know what the legal status of this contract was, or how to enforce it until the decision in the Danforth case.

Rule 12 (b) New Federal Rules
Rule 12 (h) New Federal Rules
Rule 13 (a), 13 (f) New Federal Rules
Rule 15 (a), 15 (b), 15 (d) New Federal Rules
Rule 41 (a) (2) New Federal Rules
Rule 42 (b) New Federal Rules
Rule 43 (e) New Federal Rules
Rule 60 (b) New Federal Rules

The decisions prior to the adoption of the New Rules, if effect, followed the same principle where the motion to amend came up in the appellate court as is set out in

the New Rules. Where a situation arose in the appellate court under a motion to amend pleadings that clearly shows to the court that it was necessary that the amendment be permitted in order that justice might be done, then the amendments were permitted.

Some of these decisions are as follows:

Wiggins Ferry Co. v. Ohio & Miss. R. Co. (1891), 142 U. S. 396; 35 L. ed. 1055. In this case the Court said:

> "Rules of pleading are made for the attainment of substantial justice, and are to be construed so as to harmonize with it if possible. A mistaken view of one's rights or remedies should not be permitted wholly to defeat a claim founded upon principles of equity and justice, and if the pleadings can be so amended as to admit proof of such claim, and such amendment does not introduce a new cause of action, though it may set up a new measure of damages, or work a real hardship to the party defendant, it is within the discretion even of the appellate court to permit such amendments to be made. The Schooner Anne v. United States, 11 U. S. (7 Cranch) 570; 3 L. ed. 442."

Jones v. Meehan, supra.

Howard v. De Cordova (1900) 177 U. S. 609; 44 L. ed. 908.

Norton v. Larney (1925) 266 U. S. 511; 69 L. ed. 413.

Realty Holding Co. v. Donaldson (1925) 268 U. S. 398; 69 L. ed. 1014.

Parker Washington Co. v. Cramer (7 C. C. A.) 201 Fed. 878.

Dillingham v. T. B. Allen & Co. (5 C. C. A.) 205 Fed. 146.

Fifth Third Nat. Bank v. Johnson (6 C. C. A.) 219 Fed. 89.

Drainage Dist. v. Steinberg (8 C. C. A.) 15 Fed. (2d) 41.

Finefrock v. Kenova Mine Car Co. (4 C. C. A.) 22 Fed. (2d) 627.

Marker on Fed. Appellate Jurisdiction, Sec. 256.

3 American Jurisprudence, p. 384.

We respectfully submit that the petitioner, A. J. Matthews, Trustee, should be permitted to amend his answer, showing the contracts to purchase the easement made prior to the filing of the condemnation suit and that respondent, the Government, seeks to single him out as the only landowner in all the Birds Point-New Madrid Floodway whom they will refuse to pay for the easement for flowage rights over his lands and whose rights to recover they are attempting to defeat.

We respectfully submit that the writ of certiorari petitioned for in this cause should be granted; and that the motion of petitioner for leave to amend his answer should be granted and the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 497

A. J. MATTHEWS, AS TRUSTEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 227–236) is reported in 113 F. 2d 452.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered July 16, 1940 (R. 236–237). The petition for writ of certiorari was filed October 10, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether in the absence of a taking the United States may abandon proceedings brought under authority of Section 4 of the Flood Control Act of May 15, 1928, to condemn flowage easements over lands in the Birds Point-New Madrid Floodway.

STATUTE INVOLVED

Section 4 of the Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534, 536, 33 U. S. C., Sec. 702d, provides:

> The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: * * *.
>
> The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, * * *.

STATEMENT

The judgment affirmed by the court below granted the Government's motion for voluntary nonsuit of a proceeding to condemn flowage easements over petitioner's lands located in the Birds Point-New Madrid Floodway (R. 87).[1]

---

[1] Because the land involved is located in two counties, two condemnation petitions were filed, and two appeals were taken. Since the facts and issues are the same, the parties have stipulated that a petition for certiorari be filed in one case, the decision to control the other case as well (R. 237–238).

The Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534, 33 U. S. C., Secs. 702a–m, adopted by reference the recommendations of the Chief of Engineers known as the Jadwin Plan (H. Doc. No. 90, 70th Cong., 1st Sess. (1927)). This plan recommended the creation of a floodway between Birds Point and New Madrid, Missouri, by the construction between these points of a second, or setback, levee several miles west of the existing riverside levee. The plan contemplated the reduction in height of the riverside levee from a grade of 58 to 55 feet on the Cairo gauge for a distance of about eleven miles south of Birds Point, to be known as the upper fuse plug section, and a corresponding reduction in a portion of the riverside levee for some distance at the south end of the floodway near New Madrid, to be known as the lower fuse plug section. The floodway was designed to permit the floodwaters of the Mississippi River, when the stage should exceed 55 feet on the Cairo gauge, to flow over the riverside levee just south of Birds Point, to spread out over the floodway and to flow slowly toward the south. When the flood stage of the river has sufficiently subsided, the floodwater will flow back into the river channel through the lower fuse plug section and St. Johns Bayou (R. 112–113).

The floodway, including petitioner's land, contains 130,720 acres (R. 113). Petitioner owns 20,064.69 acres (R. 112). Petitioner's land lies within the backwater area of the floodway; i. e., about

99 per cent. thereof has always been subject to overflow by backwater and surface-drainage water when the Mississippi River reached a stage of 55 feet on the Cairo gauge (R. 169).

The location of the setback levee was approved January 14, 1929, and construction was begun shortly thereafter. The floodway is now complete, except that there has not been any reduction in height of the fuse plug sections (R. 128).

On June 25, 1932, petitioner commenced an action in the Court of Claims in which he alleged that he was entitled to recover on certain contracts made in February, 1932, whereby the Government allegedly agreed to pay $394,859.51 for flowage easements over his land. The United States demurred to the petition and to an amended petition, and on April 10, 1933, on petitioner's motion, the suit was dismissed without prejudice (R. 229–230).

On the same day that he dismissed the suit on the contracts, petitioner filed another suit in the Court of Claims (R. 46–63). He did not rely upon the contracts; instead, he alleged that the passage of the Flood Control Act, the construction of the setback levee and other acts of Government officers amounted to a taking of flowage easements over his land and that, therefore, he had a claim against the United States under an "implied contract" for the value of the property so taken (R. 62). He claimed, as just compensation, $1,387,500, with interest (R. 63).

August 17, 1933, pursuant to the authorization contained in Section 4 of the Flood Control Act, *supra,* p. 2, the United States filed its petition in the District Court for the Eastern District of Missouri to condemn flowage easements over petitioner's land (R. 2–11). Petitioner answered (R. 20–45), praying that the suit be dismissed for want of jurisdiction (R. 28, 36, 45). The answer averred that, by bringing suit in the Court of Claims, petitioner had "effectively waived his right to insist on condemnation proceedings" (R. 27); that "the parties, the causes of action, scope of injury, issues, and relief sought" in the two actions were "in all respects substantially identical" (R. 36) and that the condemnation proceeding was "vexatious and oppressive" (R. 36). The District Court, however, declined to dismiss (R. 75–81). It recognized that the causes of action were the same (R. 80) but thought the condemnation proceeding should be stayed pending decision in the Court of Claims (R. 81). Accordingly, the matter of appointment of commissioners was continued from term to term and no award was ever made (R. 82–84).

On May 31, 1938, the Court of Claims found that there was no taking, concluded that petitioner was entitled to recover nothing, and dismissed the petition (R. 112–175), 87 C. Cls. 662. The court's opinion, which incorporated its findings, summarized those here material as follows (R. 169–170):

Prior to, at the time, and subsequent to the enactment of the Flood Control Act of May 15, 1928, and the construction of the set-back levee plaintiff's [petitioner's] land has been subject to complete inundation by backwaters and headwaters without any cutting down or reduction by the United States in the height of the riverside levee. As shown in the findings, all of plaintiff's land lies within the backwater area of the Birds Point-New Madrid Floodway. About 99 percent of this land has always been subject to overflow to a depth of 18 feet, and under, by backwater and surface-drainage water when the water of the Mississippi River has reached a stage of 55 feet on the Cairo gauge. * * *

The evidence of record does not establish that any additional headwater flowing over plaintiff's land by reason of the cutting down or reduction by the defendant of a section of the riverside levee near Birds Point to a grade equivalent to 55 feet on the Cairo gauge will injure, damage, or place upon plaintiff's timber or land a substantial burden or servitude to any greater extent than the timber and land have heretofore suffered, or that the creation of such spillway, through the reduction in height of a portion of the riverside levee, will actually deprive plaintiff of any valuable property rights which he heretofore enjoyed and possessed in the land and timber.

The Court of Claims concluded (R. 175):

> Upon the facts disclosed by the record and under the decisions cited, we are of opinion that there has been no taking by the United States of plaintiff's property or property rights for which recovery can be had under the Fifth Amendment. The petition is therefore dismissed.

April 6, 1939, the Secretary of War advised the Attorney General that it was unnecessary to continue the condemnation proceeding and requested that it be dismissed (R. 178–179). Pursuant to this request, the United States on April 11, 1939, applied for an order of voluntary nonsuit without prejudice (R. 84–85). Petitioner thereupon moved for the appointment of commissioners to value the property (R. 85). The findings and opinion of the Court of Claims (R. 112–175) were filed in the district court (R. 84) and October 5, 1939, order of voluntary nonsuit was entered (R. 87). The circuit court of appeals affirmed (R. 236–237).

At the same time, the circuit court of appeals denied petitioner's motion for leave to file an amended answer in that court (R. 236). The proposed amendment asserted causes of action upon the contracts alleged to have been made in February 1932, whereby the Government allegedly agreed to pay a total of $394,181.69 for easements over the lands in question; it prayed that the court specifically enforce the alleged contracts by entering decree that

the United States has flowage easements and that it pay therefor the sum of $394,181.69 (R. 183–192).

ARGUMENT

1. Petitioner acknowledges (pp. 16, 18–19) the well-established rule that, at any time before a taking, the Government may dismiss a proceeding to condemn. See e. g. *Danforth* v. *United States,* 308 U. S. 271, 284; *Lawrence Ward's Island Realty Co.* v. *United States,* 209 Fed. 201, 203 (C. C. A. 2, 1913); *Kanakanui* v. *United States,* 244 Fed. 923, 924 (C. C. A. 9, 1917); *Owen* v. *United States,* 8 F. 2d 992 (C. C. A. 5, 1925); *Johnson & Wimsatt* v. *Reichelderfer,* 66 F. 2d 217, 218 (App. D. C., 1933). He concedes also (pp. 35, 37, 41) that the findings and judgment of the Court of Claims establish that easements over his lands have not been taken. And, as the court below pointed out (R. 229, 234), he does not assert that subsequent to the action in the Court of Claims there was an appropriation of his property.[2]

However, petitioner contends (pp. 17–25) that the action could not be dismissed because Section 4 directs the Secretary of War to condemn flowage easements over lands in the Birds Point-New Madrid Floodway. But Section 4 provides that ease-

[2] Petitioner's property is in the same floodway as the land involved in *Danforth* v. *United States,* 308 U. S. 271, and this Court held that there had been no taking of the Danforth tract.

ments are to be acquired only when in the opinion of the Secretary they "are needed" in carrying out the project. The findings and judgment of the Court of Claims establish that the easements sought in the dismissed proceeding are *not* needed for maintenance of the Floodway. Therefore, the Secretary requested the Attorney General to dismiss the proceeding. The Secretary's determination is conclusive. *Rindge Co.* v. *Los Angeles,* 262 U. S. 700, 709; *Bragg* v. *Weaver,* 251 U. S. 57, 58. There is, of course, no warrant for petitioner's assertion (pp. 26–28) that the Secretary did not act in good faith.

Petitioner alleges (pp. 28–33) that he had agreements with the United States like that considered by this Court in *Danforth* v. *United States,* 308 U. S. 271. He asserts that therefore the action to condemn could not be dismissed. But in the *Danforth* case this Court stated (p. 284), "the taking in a condemnation suit *under this statute* takes place upon the payment of the money award by the condemnor. * * * Until taking, the condemnor may discontinue or abandon his effort." (Italics ours.) If, as petitioner alleges, he made contracts like that involved in the *Danforth* case, it follows that, as there said, the contracts would not prevent discontinuance of this proceeding at any time prior to the payment of award by the United States.

Moreover, as the court below held (R. 235–236):

> But in that [Danforth] case the landowner adhered to his contract rights, while in the present case Matthews not only elected the inconsistent remedy of suit on an implied contract for $1,387,500.00 rather than suing on the agreement contracts for $394,859.51, but he further specifically pleaded that he waived his right to insist upon condemnation. Matthews' agreement to set a price on his flowage easement was by the terms of the agreement valueless if he waived any right to insist upon condemnation, since the obligation of the government under the agreement was to institute condemnation proceedings and in such proceedings recommend the agreed value stated as the fair value to be rendered in judgment. The agreement was repudiated by the government, and the subsequent conduct and pleading of Matthews constituted acquiescence in the repudiation. *He has in the clearest manner elected to consider the contract abrogated and estopped himself from denying that his waiver of remedy by enforcement of the contract was final and binding.* [Italics ours.]

2. There is no substance to petitioner's contention (pp. 43–46) that the court below should have permitted him to amend his answer to set up the Government's offer to purchase the flowage rights

(see R. 224–226). As the court held (R. 236), the amendment, if made, would not affect the result.

CONCLUSION

The decision of the Circuit Court of Appeals is correct and presents neither a conflict of decisions nor a question of general importance. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.

OCTOBER 1940.

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